Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang & Ors

HIGH COURT (MALACCA) — PETITION NO MT1–26–5 OF 2003
LOW HOP BING J
27 APRIL 2009

Companies and Corporations — Member's rights — Oppression — Petition under the Companies Act 1965 s 181 — Allegation of financial irregularities — First petitioner not a shareholder — Stifling civil suit by company against directors — Depletion of company's assets — Whether detriment suffered by petitioners as minority shareholders — Whether burden of proof on petitioners — Whether essential elements under s 181(1)(a) established — Whether first petitioner had locus standi to present petition

Cin Holdings Sdn Bhd ('Cin Holdings') was incorporated under the Companies Act 1965 ('the Act'), as a private company limited by shares, to undertake investments. Its initial shareholders were the first petitioner, the fourth petitioner and the first respondent. Subsequently, the membership of Cin Holdings was extended. The petitioners' cause of action in this suit alleged oppression and/or disregard by the majority shareholders of the minority shareholders' interest under s 181(1)(a) of the Act and sought declarations that the Form 49 of Cin Holdings executed by the first respondent and all the statutory documents lodged with the Companies Commission of Malaysia were null and void. The petitioners also sought an injunction to restrain the respondents from, inter alia: (i) removing the first, third, fourth and sixth petitioners as directors of Cin Holdings; (ii) acting on behalf of Cin Holdings in enforcing any resolution passed at the directors' meetings; and (iii) discontinuing the civil suit filed against the first respondent and Cin Holdings' statutory auditor ('the civil suit'). The petitioners also prayed that the respondents be ordered, in proportion to their respective shareholdings, to purchase the 21.6875% shareholding owned by the first to the eighth petitioners in Cin Holdings ('the petitioners' shares'). The first respondent raised a preliminary issue that the first petitioner was not a shareholder of Cin Holdings and so had no locus standi to present the petition under s 181 of the Act. The petitioners contended that the first petitioner was the alter ego of the second petitioner ('Kosian Holdings'), as he was related to and controlled the second petitioner which in turn held 262,500 ordinary shares in Cin Holdings.

Held allowing the application with costs:

(1) The first petitioner controlled the second petitioner and so was in law the second petitioner's directing mind and will. He was indeed the second petitioner's alter ego. The first petitioner qua director obviously had the capacity and locus standi to present this petition. The objection raised for the respondents was misconceived (see paras 19–22).

(2) The petitioners who desired the court to give judgment as to the legal right or liability, dependent on the existence of facts asserted in relation to the petition under s 181(1)(a) of the Act, bore the burden of proving their case (see para 23).

(3) Section 181 of the Act deserves to receive a liberal and purposive construction. Section 181(1)(a) sets out three essential elements which the petitioners have to establish, viz oppressive conduct or conduct in disregard of interests; the conduct must relate to the affairs of the company, or the exercise of powers by the director(s); and the conduct affects one or more of the members of the company including the petitioner(s) (see paras 25–26).

(4) In relation to the allegation of financial irregularities, the petitioners' version of the facts was the reasonable, credible and probable version as it was cogently supported by documentary evidence. The evidence adduced for the respondents was self-destructive and clearly contradicted their own contemporaneous documents (see para 55).

(5) The respondents' ulterior motive or mala fides to remove the petitioners as directors was clearly to stifle or discontinue the civil suit. The first respondent's attempt to stifle the civil suit by Cin Holdings against him and his irregular transactions had caused the depletion in Cin Holdings' assets, especially its cash reserves, to the benefit of the respondents but to the detriment of the petitioners who were the minority shareholders (see paras 63–64).

(6) The petitioners had established all the three essential elements under s 181(1)(a) of the Act, for which the remedies are available under s 181(2) of the Act (see para 65).

[Bahasa Malaysia summary

Cin Holdings Sdn Bhd ('Cin Holdings') telah diperbadankan di bawah Akta Syarikat 1965 ('Akta tersebut'), sebagai sebuah syarikat swasta terhad menurut saham, bagi menguruskan pelaburan-pelaburan. Pemegang-pemegang saham pada permulaannya adalah pempetisyen pertama, pempetisyen keempat dan responden pertama. Kemudiannya, keahlian bagi Cin Holdings telah dilanjutkan. Kausa tindakan

pempetisyen-pempetisyen dalam tindakan ini mendakwa mengenai penindasan dan/atau pengabaian oleh pemegang saham majoriti terhadap kepentingan pemegang-pemegang saham minoriti di bawah s 181(1)(a) Akta tersebut dan memohon pengisytiharan bahawa Borang 49 Cin Holdings yang dilaksanakan oleh responden pertama dan semua dokumen-dokumen berkanun yang diserah-simpan dengan Suruhanjaya Syarikat Malaysia adalah terbatal dan tak sah. Pempetisyen-pempetisyen juga memohon satu injunksi bagi menghalang responden-responden daripada, antara lain: (i) memberhentikan pempetisyen yang pertama, ketiga, keempat dan yang keenam sebagai pengarah-pengarah Cin Holdings; (ii) bertindak bagi pihak Cin Holdings dalam menguatkuasakan sebarang resolusi yang diluluskan pada mesyuarat pengarah-pengarah; dan (iii) menghentikan guaman sivil yang difailkan terhadap responden pertama dan juruaudit berkanun Cin Holdings ('guaman sivil tersebut'). Pempetisyen-pempetisyen juga memohon agar responden-responden diperintahkan, seimbang dengan pemilikan saham masing-masing mereka, bagi membeli 21.6875% pemilikan saham yang dimiliki oleh yang pempetisyen pertama hingga pempetisyen kelapan dalam Cin Holdings ('saham pempetisyen-pempetisyen tersebut'). Responden pertama membangkitkan satu isu permulaan bahawa pempetisyen pertama bukan seorang pemegang saham Cin Holdings oleh itu tidak mempunyai locus standi untuk mengemukakan petisyen di bawah s 181 Akta tersebut. Pempetisyen-pempetisyen menyatakan bahawa pempetisyen pertama adalah alter ego pempetisyen kedua ('Kosian Holdings'), kerana dia ada perhubungan dan mengawal pempetisyen kedua yang memegang 262,500 saham biasa dalam Cin Holdings.

Diputuskan membenarkan permohonan dengan kos:

(1) Pempetisyen pertama mengawal pempetisyen kedua dan oleh itu di sisi undang-undang adalah pengawal fikiran dan kehendak pempetisyen kedua. Dia memang adalah alter ego pempetisyen kedua. Pempetisyen pertama sebagai pengarah dengan nyatanya mempunyai keupayaan dan locus standi untuk mempersembahkan petisyen ini. Bantahan yang timbulkan untuk responden-responden adalah silap (lihat perenggan 19, 20 & 22).

(2) Pempetisyen-pempetisyen yang berhasrat untuk mahkamah memberi penghakiman terhadap hak undang-undang atau liabiliti, bergantung kepada kewujudan fakta-fakta yang dinyatakan berkaitan dengan petisyen di bawah s 181(1)(a) Akta tersebut, memikul beban untuk membuktikan kes mereka (lihat perenggan 23).

(3) Seksyen 181 Akta tersebut berhak bagi menerima pentafsiran yang liberal dan bertujuan. Seksyen 181(1)(a) menetapkan tiga unsur-unsur penting yang pempetisyen-pempetisyen perlu buktikan, iaitu kelakuan

bersifat menindas atau kelakuan yang mengabaikan kepentingan-kepentingan; kelakuan tersebut mesti berkait dengan hal ehwal syarikat, atau penggunaan kuasa-kuasa oleh pengarah; dan kelakuan tersebut melibatkan seorang atau lebih ahli-ahli bagi syarikat itu termasuk pempetisyen (lihat perenggan 25–26).

(4) Berkaitan dengan dakwaan luar aturan kewangan, versi fakta-fakta pempetisyen adalah munasabah, boleh dipercayai dan versi yang berkemungkinan kerana ia dengan yakinnya disokong oleh keterangan dokumentar. Bukti yang dikemukakan untuk responden-responden adalah memusnahkan diri sendiri dan jelas bertentangan dengan dokumen-dokumen mereka sendiri (lihat perenggan 55).

(5) Motif terselindung responden-responden atau mala fides bagi menyingkirkan pempetisyen-pempetisyen sebagai pengarah-pengarah adalah dengan jelas untuk menumpaskan atau menghentikan guaman sivil tersebut. Percubaan responden pertama untuk menahan guaman sivil tersebut oleh Cin Holdings terhadap beliau dan terhadap transaksi-transaksi luar aturan yang telah menyebabkan penyusutan dalam aset-aset Cin Holdings, terutamanya simpanan-simpanan tunainya, untuk manfaat responden-responden tetapi kepada kemudaratan pempetisyen-pempetisyen yang merupakan pemegang saham minoriti itu (lihat perenggan 63–64).

(6) Pempetisyen-pempetisyen telah membuktikan kesemua tiga unsur-unsur penting di bawah s 181(1)(a) Akta tersebut, yang mana remedi-remedinya adalah diperuntukkan di bawah s 181(2) Akta (lihat perenggan 65).]

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 501–548.

Cases referred to

Associated Tools Industries Ltd, Re [1963] 5 FLR 55 (refd)

Coliseum Stand Car Service Ltd Abdul Khalik, Re v Mohamed Jee & Ors [1972] 1 MLJ 109, HC (refd)

Cumberland Holdings Ltd, Re (1976) 1 ACLR 361 (refd)

Datuk Sahar bin Arpan v PP [2007] 1 MLJ 697, CA (refd)

East West Promotions Pty Ltd, Re (1986) 4 ACLC 84 (refd)

Elder v Elder & Watson [1952] SC 49, HL (refd)

Eric Lau Man Hing v Eramera Jaya Sdn Bhd & Ors [1998] 7 MLJ 528, HC (refd)

Hayes v Bristol Plant Hire Ltd & Ors [1957] 1 All ER 685, Ch D (refd)

HR Harmer Ltd, Re [1959] 1 WLR 62, CA (refd)

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332, HC (refd)
Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors [1994] 1 MLJ 520, HC (refd)
Kenari Resorts Pte Ltd, Re [1995] 3 SLR 685, HC (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re & Ors v Ling Beng Sung [1978] 2 MLJ 227, PC (refd)
Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals [1995] 2 SLR 297, CA (refd)
MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor [2003] 5 MLJ 303, HC (refd)
Ng Kok Pooi v Brundswood ID Sdn Bhd [2006] 2 MLJ 365, HC (refd)
Nicholas v Soundcraft Electronics Ltd & Anor [1993] BCLC 360 (refd)
Nuri Asia Sdn Bhd v Fosis Corp Sdn Bhd & Anor [2006] 3 MLJ 249, HC (refd)
Scottish Co-operative Wholesale Society Ltd v Meyer & Anor [1959] AC 324, CA (refd)
Tan Kian Hua v Colour Image Scan Sdn Bhd & Ors [2004] MLJU 178; [2004] 6 CLJ 174, HC (refd)
Tenaga Nasional Bhd (formerly Lembaga Letrik Negara Tanah Melayu) v Perwaja Steel Sdn Bhd (Formerly Perwaja Terengganu Sdn Bhd) [1995] 4 MLJ 673; [1995] 4 CLJ 670, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Verghese Mathai v Telok Plantations Sdn Bhd [1998] 3 MLJ 216, HC (refd)

Legislation referred to

Companies Act 1948 [UK] s 210
Companies Act 1965 ss 128, 156, 167, 181, 181(1)(a), (2), Forms 48A, 49
Corporation Law [AUS] s 53
Evidence Act 1950 s 101(1), (2)
Interpretation Acts 1948 and 1967 s 17A
Uniform Companies Act 1962 [AUS] s 186

Wong Rhen Yen (Zainudin Wan Nadzim Chua & Mazlinda) for the petitioners.
Moi Teik Seng (Moi Teik Seng & Partners) for the first respondent.
CT Siew (Abdullah, Ooi & Chan) for the second to tenth respondents.

Low Hop Bing J:

CAUSE OF ACTION

[1] The petitioners' cause of action alleges oppression and/or disregard by the majority shareholders of the minority shareholders' interest under s 181(1)(a) of the Companies Act 1965; and sought:

(1) a declaration that:

(a) Form 49 dated 13 August 2003 (the Return Giving Particulars in Register of Directors, Managers and Secretaries and Changes of Particulars) of Cin Holdings Sdn Bhd ('Cin Holdings') (ninth petitioner) executed by Ki Tak Sang (first respondent), and all the statutory documents lodged with the Companies Commission of Malaysia ('CCM') by one Tee Geok Hoon of Key Consult Sdn Bhd on 21 August 2003 are null and void;

(b) The directors' meetings held pursuant to the composition of the directors and secretaries set out in Form 49 are null and void;

(c) The said Tee Geok Hoon has not been legally appointed as the company secretary of Cin Holdings;

(2) An injunction restraining the respondents and/or their proxies and/or otherwise howsoever from proposing and/or voting for any resolution:

(a) for the removal of the first, third, fourth and sixth petitioners as directors of Cin Holdings; or

(b) to discontinue Civil Suit No MT2–22–77 of 2003 filed in the Melaka High Court by Cin Holdings ('the civil suit') against the first respondent and Messrs OL Yeo & Co; and

(3) An injunction restraining the respondents and/or their proxies and/or otherwise howsoever from purportedly acting on behalf of Cin Holdings in enforcing any resolution passed at the directors' meetings as set out in para (1)(b) above.

Further and/or in the alternative, the petitioners pray that:

(4) the respondents be ordered, in proportion to their respective shareholdings, to purchase the 21.6875% shareholding owned by the first to the eighth petitioners (equivalent to 867,500 ordinary shares of RM1 each in Cin Holdings) ('the petitioners' shares') based on the net tangible asset of RM4.2353 per share as set out in the special audit report dated 18 October 2002 prepared by Messrs Lim Wuay Chern & Co, ('the special audit report') amounting to RM3,674,122.75;

(5) damages to be assssed;

(6) interest at 8%pa from 19 October 2002 to the date of realisation; and

(7) costs.

(A reference hereinafter to a section is a reference to that section in the Companies Act 1965, unless otherwise stated).

AGREED FACTS

[2] Cin Holdings was incorporated on 10 September 1983 under the

Companies Act 1965, as a private company limited by shares, to undertake investments. Its registered office is at 82B, Jalan Kampung Hulu, 75200 Melaka. Its authorised capital is RM10,000,000 divided into 10,000,000 shares of RM1 each. The paid-up capital is RM4,000,000.

[3] Its initial shareholders are Koh Jui Hiong (first petitioner), Tan Kim Chua (fourth petitioner) and Ki Tak Sang (first respondent).

[4] Subsequently, the membership of Cin Holdings was extended and, as at the date of this petition, the particulars are as follows:

	Shareholders	Shareholding at RM1 per share	Percentage %
1	Kosian Holdings Sdn Bhd (second petitioner)	262,500	6.5625
2	Sim Sai Boy (third petitioner)	250,000	6.2500
3	Tonisons Jaya Holdings Sdn Bhd (fifth petitioner)	75,000	1.8750
4	Yam Wai Hong (sixth petitioner)	55,000	1.3750
5	Ki Tak Sang @ Kee Tak Sang (first respondent)	570,000	14.2500
6	Teoh Choon Neo @ Ivy Teoh Choon Neo (second respondent)	400,000	10.0000
7	Kivy Holdings Sdn Bhd (third respondent)	1,000,000	25.0000
8	Goh Koon Eng (fourth respondent)	175,000	4.3750
9	Ng Thiam Chua (sixth respondent)	87,500	2.1875
10	Ng Kwee Siang (ninth respondent)	112,500	2.8125
11	Tan Hee Ming @ Tan Hi Mian (tenth respondent)	100,000	2.5000
12	Tan Lai Choon (fifth respondent)	200,000	5.0000
13	Ng Tiam Mok (seventh respondent)	87,500	2.1875
14	Yeap Kai Lang (seventh petitioner)	100,000	2.5000
15	Tio Sian Poh @ Teo Siam Pah (Dato)	150,000	3.7500

16	Goh Kian Heng (petitioner 8)	125,000	3.1250
17	Ng Ah Moy @ Ng Gek Hiok (respondent 8)	250,000	6.2500
	TOTAL	4,000,000	100.0000

[5] The second petitioner, Kosian Holdings Sdn Bhd, is a nominee company which is related to and controlled by the first petitioner.

[6] The fifth petitioner is a nominee company which is related to and controlled by the fourth petitioner, Tan Kim Chua.

[7] The first respondent is the majority shareholder of Kivy Holdings (third respondent), while Teo Choon Neo @ Ivy Teoh Choon Neo (second respondent) is the first respondent's wife.

[8] The second to eighth petitioners jointly have 21.6875% shareholding in Cin Holdings, while the respondents jointly have 74.5625% thereof. The balance of 3.75% was held by one Dato Tio Sian Pah ('SD5') who is not a party to this petition.

[9] Pursuant to the mandate of Cin Holdings' board of directors dated 31 October 2001, vide circular resolution signed by the first respondent, an ad hoc committee was formed to investigate Cin Holdings' accounts. Mr Yam Wai Hong (sixth petitioner) was appointed the chairman thereof.

[10] The ad hoc committee completed its investigations and prepared its report on 27 June 2002 ('the ad hoc report').

[11] Thereafter, the sixth petitioner was appointed a director of Cin Holdings. As at 21 May 2003, Cin Holdings' directors were the first respondent, and the first, third, fourth and sixth petitioners.

[12] Cin Holdings' board of directors had on or about 2 October 2002 appointed a firm of external auditors, Messrs Lim Wuay Chern & Co ('the external auditors') to conduct a special audit of Cin Holdings' accounts for the years ended 31 December 1997 to 2001, and for the nine month-period ended 30 September 2002, and to independently review the ad hoc report. Thereafter, the auditors prepared the special audit report for Cin Holdings.

[13] Cin Holdings' assets comprised investments in the shares of, inter alia, public listed companies including Polymate Holdings Bhd ('PHB') listed on

the second board of the Kuala Lumpur stock exchange on 29 April 1997. As of 2 May 1997, Cin Holdings owned 1,346,100 PHB shares.

[14] The first respondent was Cin Holdings' managing director from 7 October 1983 to 2 May 2002, primarily responsible for Cin Holdings' financial management.

[15] Other facts established by way of evidence will be set out later in this judgment.

LOCUS STANDI

[16] The first respondent through learned counsel Mr Moi Teik Seng raised a preliminary issue ie the first petitioner is not a shareholder of Cin Holdings and so has no locus standi to present the petition under s 181. To buttress the submission, reference was made to:

(1) *Verghese Mathai v Telok Plantations Sdn Bhd* [1998] 3 MLJ 216 (HC); and

(2) *Ng Kok Pooi v Brundswood ID Sdn Bhd* [2006] 2 MLJ 365 (HC).

[17] Mr CT Siew, learned counsel for the second to the tenth respondents, submitted that the first and ninth petitioners are not the shareholders of Cin Holdings and so cannot be the proper petitioners under s 181.

[18] The petitioners' learned counsel Mr Wong Rhen Yen (Mr R Rajasingam and Mr Mohd Faizul Nasir with him) contended, inter alia, that:

(1) The first petitioner is the alter ego of the second petitioner, Kosian Holdings Sdn Bhd ('Kosian Holdings'), as he is related to and indeed controls the second petitioner which in turn holds 262,500 ordinary shares in Cin Holdings, relying on *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697 (CA); and

(2) This petition seeks an injunction to restrain the removal of the first petitioner as the director of Cin Holdings and so the first petitioner has the legitimate interest and expectation to present this petition.

[19] It is my specific finding that the first petitioner controls the second petitioner and so in law the second petitioner's directing mind and will. He is indeed the second petitioner's alter ago. A similar situation surfaced in *Datuk Sahar bin Arpan*. In delivering judgment of the Court of Appeal at p 705, I held:

A [47] There can be no doubt that on the facts the accused was at all material time directing mind and will of Ivory Heights, and controlled what it did, thereby making him the alter ego of Ivory Heights (see *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 157, p 172 per Lord Denning MR, cited with approval in *E v Comptroller General* B *of Inland Revenue* [1970] 2 MLJ 117, p 128 (FC)).

[48] The accused was at all material time an embodiment of Ivory Heights and his mind is that of Ivory Heights (see *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, at p 170 per Lord Reid, followed in *Yue Sang* C *Cheong Sdn Bhd v Public Prosecutor* [1973] 2 MLJ 77 (FC)).

[49] The accused was indeed the puppeteer who pulled the strings of his puppets viz SP52 and the said Luwe Sang Kau who were directors-cum-shareholders of Ivory Heights and who danced to the tune of the accused.

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[20] Quite apart from that, the first and ninth petitioners are also seeking declaratory orders and injunctions against the respondents to restrain them from removing the first petitioner as a director of Cin Holdings. In this E connection, the first petitioner qua director obviously has the capacity and locus standi to present this petition.

Verghese Mathai, and *Ng Kok Pooi*, cited for the first respondent, concern striking out applications made by the respondents in those cases. However, the petition before me does not involve such applications.

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[21] In the circumstances, I hold that the objection raised for the respondents is misconceived. The petition deserves consideration and determination on its merits.

G BURDEN OF PROOF

[22] The petitioners who desire this court to give judgment as to the legal right or liability, dependant on the existence of facts which he asserts in relation to the petition under s 181(1)(a), bear the burden of proving their H case. Section 101(1) and (2) of the Evidence Act 1950 merit reproduction as follows:

101 *Burden of proof*

I (1) Whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(See eg *MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor* [2003] 5 MLJ 303; *Tenaga Nasional Bhd (formerly Lembaga Letrik Negara Tanah Melayu) v Perwaja Steel Sdn Bhd (formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 MLJ 673; [1995] 4 CLJ 670, *Nuri Asia Sdn Bhd v Fosis Corp Sdn Bhd & Anor* [2006] 3 MLJ 249 at p 254).

PRINCIPLES GOVERNING S 181 PETITION

[23] Section 181(1)(a) on which the petition is founded, where relevant, reads:

(1) Any member ..., may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members ... including himself or in disregard of his or their interests as members, shareholders ... of the company; or

(b) ...

[24] A very useful source of reference is to be found in Loh Siew Cheang's '*Corporate Powers*' MLJ 1996 at p 130 et seq. The learned author has commendably carried out extensive research into this area of the law. Authorities abound to show that s 181 (the equipollent provisions viz s 210 of the UK Companies Act 1948 or s 186 of the (Australian) Uniform Companies Act 1962) deserves to receive a liberal and purposive construction: see *Scottish Co-operative Wholesale Society Ltd v Meyer & Anor* [1959] AC 324 (CA) per Lord Denning MR (in relation to s 210); and *Re Associated Tools Industries Ltd* [1963] 5 FLR 55 per Joske J (in relation to s 186). Section 17A of our Interpretation Acts 1948 and 1967 gives expression to the rule of purposive interpretation in the following words:

Regard to be had to the purpose of Act

17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[25] Section 181(1)(a) sets out three essential elements which the petitioners have to establish, viz:

(1) oppressive conduct or conduct in disregard of interests;

A (2) the conduct must relate to the affairs of the company, or the exercise of powers by the director(s); and

(3) the conduct affects one or more of the members of the company including the petitioner(s).

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[26] The word 'oppressive' was defined in *Re HR Harmer Ltd* [1959] 1 WLR 62 to mean 'burdensome, harsh and wrongful'.

C **[27]** In *Re Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 Lord Wilberforce, in delivering the advice of the Privy Council, applied the broader definition of oppression in *Elder v Elder & Watson* [1952] SC 49, involving an appeal from Scotland to the House of Lords, where Lord Cooper explained:

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> ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to reply ...

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[28] Within our shores, the broader definition of oppression was applied by Siti Norma J (later CJ(M)) in *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520 at p 536 (HC) as follows:

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> ... oppression does not necessarily mean illegal or fraudulent nor does it require fraud. For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play and where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor.

G **[29]** The statutory concept of '*conduct in disregard of interests*' was illuminated in *Re Kong Thai Sawmill (Miri) Sdn Bhd*, where at p 229, the Privy Council held that the conduct in disregard of interests is not the same as oppressive conduct through it is implicit in oppressive conduct. It involves something more than a failure to take account of the minority's interest; there H must be awareness of that interest and an evident intention to override it or brush it aside or set at naught the proper company procedure: p 229.

[30] Although our Companies Act 1965 does not define the expression *affairs of the company*', I am inspired by the position in Australia where this I expression is defined in s 53 of the Australian Corporation Law to include, inter alia, matters relating to trading activities, and profits and loss, its internal management and proceedings, voting rights, or 'securities' in and made available by the company. In *Re Cumberland Holdings Ltd* (1976) ACLR 361, Bowen CJ construed this expression widely, as it is not limited

to business or trade matters but encompassess all matters which may come before the board for consideration: pp 374–375. A

[31] Illustrations of this expression are:

(1) The conduct of a director removing all the furniture, equipment and the company's books and records from the office where the company carried out its business: *Re East West Promotions Pty Ltd* (1986) 4 ACLC 84; B

(2) Failure to pay money due to a subsidiary: *Nicholas v Soundcraft Electronics Ltd & Anor* [1993] BCLC 360; and C

(3) Where a person is nominated by a joint venture company to act as a director of another company acts as in a manner which is detrimental to the joint venture company: *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals* [1995] 2 SLR 297; and *Re Kenari Resorts Pte Ltd* [1995] 3 SLR 685. D

[32] Having set out the above principles, I shall now consider whether the petitioners have discharged their burden of proving the elements under s 181(1)(a). In this regard, the three essential elements, which are indeed intertwined, may be considered conjunctively by reference to the complexity of the facts and circumstances in this petition, which revolve around financial irregularities predominantly perpetrated by the first respondent. E

FINANCIAL IRREGULARITIES F

[33] Everything began with Ki Tak Sang, the first respondent. He was the managing director of Cin Holdings from 7 October 1983 to 2 May 2002. G

[34] The ad hoc report signed by the chairman Yam Wai Hong (sixth petitioner), and other members viz Koh Jui Hiong (first petitioner), Sim Sai Boy (third petitioner), Tan Kim Chua (fourth petitioner), Goh Koon Eng (fourth respondent) and Ng Kwee Siang (ninth respondent), concluded that the first respondent had, during his tenure as the managing director, committed irregular financial transactions which were the subject matters of various police reports lodged by the first, third and fourth petitioners which may be enumerated below: H

(1) The first respondent's unauthorised disposal of Cin Holdings PHB shares, in the absence of any directors' or shareholders' resolution, resulting in the loss of Cin Holdings' 446,100 PHB shares; I

(2) By the way of irregular journal entries, the first respondent had caused the payment to himself of a total amount of RM164,300 from the

funds of Cin Holdings without any resolution, resulting in Cin Holdings assuming the debts due to Cintah Marketing Sdn Bhd (RM75,000); and Gim Hing Realty Sdn Bhd (RM89,300); and

(3) The purported purchase of 200,000 PHB shares at RM8 per share from one Tuan Syed Izhar Al-Idrus bin Syed Salleh ('Syed Izhar') (SP5), although Syed Izhar had affirmed a witness' statement in encl (94) refuting the purchase.

[35] The ad hoc report had been confirmed by the special audit report which arrived at the following conclusions:

(1) Cin Holdings 46,100 PHB shares vide certificate No 115 were transferred to Dato Tio Sian Pah (SD5) by the first respondent on behalf of Cin Holdings at zero consideration;

(2) There was no resolution to support the averment by Dato Tio and the first respondent that Cin Holdings PHB shares were pledged to Malpac Securities which had subsequently disposed of the pledged shares by way of forced sale;

(3) On 25 November 1998, Cin Holdings repurchased Cin Holdings' 900,000 PHB shares from the first respondent;

(4) Cin Holdings suffered losses as a result of the first respondent's dealings in Cin Holdings PHB shares;

(5) Cin Holdings paid to the first respondent a total amount of RM164,300 out of its funds, without any resolution, as repayment of the debt owed by Cintah Marketing Sdn Bhd and Gim Hing Realty Sdn Bhd to the first respondent;

(6) The statutory audited accounts for the financial years ended 1997 to 2001 could not be properly drawn up;

(7) At the directors' meeting on 18 October 2002, one Mr Chua Seak Peng of Messrs OL Yeo & Co, Cin Holdings statutory auditor who was present by invitation, did not object to SP2's (the external auditor's) opinion expressed in the special audit report; and

(8) Cin Holdings' net tangible asset, as at 30 September 2002, was RM4.2353 per share.

[36] Syed Izhar (SP5) was the bumiputra investor approved by the Ministry of International Trade & Industries ('MITI') to subscribe to 3,000,000 PHB

shares. These shares could not be disposed of or transferred without MITI's prior approval. Although SP5 had never subscribed to these shares, there was an undated and unsigned agreement whereby, instead of Cin Holdings, the first respondent had purchased 400,000 PHB shares from SP5 at RM8 per share. Cin Holdings had disbursed RM200,000 to the first respondent and a further sum of RM100,000 to Dato Tio, allegedly as refund for advances allegedly given by the first respondent and Dato Tio respectively for the purchase. No money was paid by the first respondent, nor was approval ever obtained from MITI for the purchase. The share transactions were and are never reflected in the CDS periodic statement, or in PHB's register or other registers. There was also no resolution either by Cin Holdings board of directors or shareholders to authorise the transactions.

[37] The respondents' witnesses have contradicted their own affidavits and contemporaneous documents. They have been evasive and even refused to answer questions.

[38] Illustrations abound. Paragraph 8(d) of the the first respondent's affidavit in encl (26) refers to the purchase of 46,100 PHB shares by Dato Tio at the initial public offer ('IPO') price of RM5 per share. When cross-examined, the respondent testified that these shares were given to the IPO listing committee through Dato Tio as 'unofficial listing expenses'. This is sharply contradictory to the prospectus which already shows the astronomical listing expenses of RM11m. The first respondent then reversed his evidence and said that the 46,100 PHB shares were sold to him personally at RM5 per share. He then said that there was no sale of the 46,100 PHB shares to Dato Tio. Apart from the 46,100 shares, the first respondent had purportedly, on behalf of Cin Holdings, made a further advance of RM389,364 to Dato Tio. There was no directors' or shareholders' resolution to authorise these transactions.

[39] The first respondent insisted that Cin Holdings had purchased 200,000 PHB shares as part of the total purchase of the 2,000,000 PHB shares from Syed Izhar at RM8 per share, nothwithstanding the absence of a director's or shareholders' resolution.

[40] The first respondent, inter alia, affirmed a statutory declaration seeking to rebut the special audit report. However, he did not produce the relevant minutes of directors' meeting or annual general meeting. I note that the statutory declaration was affirmed by the first respondent some seven years after the transactions. The statutory declaration is a recent invention. It is completely inconsistent with s 156 which requires all minutes of meetings of directors to be entered in books kept for the purpose within 14 days of the date of which the relevant meeting was held and such minutes must be signed

by the chairman of the meeting. The statutory declaration cannot replace minutes of meetings of directors or shareholders.

[41] Dato Tio claimed to be in charge of Cin Holdings' payment of the listing expenses of PHB and the subsequent ill-fated investment in the acquisition of 2,000,000 PHB shares from Syed Izhar. Dato Tio was the chairman and a substantial shareholder of PHB. He had 150,000 ordinary shares in Cin Holdings. He received a sum of RM389,364 and 46,100 PHB shares for the 'listing expenses' from Cin Holdings without any directors' or shareholders' resolution.

[42] The first respondent had caused Cin Holdings to transfer the 46,100 PHB shares to Dato Tio who could not recollect the amount of contribution by the other shareholders towards the 'listing expenses' of PHB. He claimed that '*ini perkara rahsia. Saya tidak boleh beritahu*'. ('This matter is secret. I cannot tell').

[43] Dato Tio could not produce any CDS statement to show the purchase of 2,000,000 from Syed Izhar, but shifted the responsibility to one Dato' Ng Kim Wend who was alleged to have been in charge of the negotiation and arrangement of the purchase and who would then inform him (Dato Tio) of the outcome. The said Dato Ng did not appear as a witness.

[44] Although Dato Tio had allegedly advanced a sum of RM1.4m to Cin Holdings towards the purchase of 200,000 PHB shares from Syed Izhar, he could not produce any proof of such an enormous advance. There was no directors' or shareholders' resolution to approve the 'listing expenses' and purchase shares from Syed Izhar. There was also no such resolution to pledge Cin Holdings 200,000 PHB shares to Malpac Securities in order to secure a loan of RM10m.

[45] Dato Tio could not remember whether he had informed KLSE (now Bursa Malaysia) of the acquisition of 2,000,000 PHB shares from Syed Izhar, nor sought MITI's approval therefor.

[46] Dato Tio did not have a copy of the share margin agreement with Malpac Securities, although he claimed to be a party thereto. Cin Holdings and Dato Tio were parties ie borrowers in the share margin account with Malpac Securities. This is contrary to the first respondent's evidence that Cin Holdings was not a party to the share margin account.

[47] Although Cin Holdings made two payments of RM50,000 each to Dato Tio as reimbursements for the interest imposed by Malpac Securities in the share margin account, he was unable to provide any documentary evidence to substantiate the interest imposed by Malpac Securities.

[48] He had never seen journal vouchers 33 and 38 which respectively recorded that he had purchased 400,000 and 200,000 PHB shares from Cin Holdings. He agreed with the suggestion by petitioners' counsel that the findings by Wong Soon Fong ('SD3') in SD3's report on this transaction was untrue.

[49] Dato Tio was handling Cin Holding's Malpac Securities account for the first respondent in relation to the transactions of Cin Holdings. These transactions were not reflected in Cin Holdings' accounts. In my judgment, that runs counter to s 167 which provides for accounts to be kept. The relevant provisions are reproduced below:

167 Accounts to be kept.

(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

(1A) Every company and the directors and managers thereof shall cause appropriate entries to be made in the accounting and other records within sixty days of the completion of the transactions to which they relate.

(2) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which they respectively relate.

(3) ...

(4) ...

(5) ...

(6) The Court may in any particular case order that the accounting and other records of a company be open for inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

(7) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act. Penalty: Imprisonment of 'six months or five thousand ringgit or both.'

[50] The fourth respondent Goh Koon Eng ('SD2') assisted in administering Cin Holdings affairs since 1985. He was to keep the share scripts (including PHB shares) in the safe deposit box in Visia Finance and later, when a new safe deposit box was opened, in Southern Bank in March 1998. However, after the safe deposit box in Southern Bank was opened in 1998, the fourth respondent destroyed the records of the share scripts kept in Visia Finance without informing Cin Holdings board of directors. Share certificate No 114 for 933,408 PHB shares was given by the fourth respondent to the first respondent to be split. However, subsequently, the first respondent returned only 600,000 PHB shares to the fourth respondent. The fourth respondent was aware that 300,000 PHB shares in certificates No 141, 142 and 143 were pledged by the first respondent to Malpac Securities, without any directors' or shareholders' resolution. The fourth respondent did not know the fate of certificate No 151 for 33,408 PHB shares given to the first respondent. On 7 August 1998, the fourth respondent handed over another 100,000 PHB shares to the first respondent to be pledged. The first and fourth respondents were signatories to Cin Holdings share trading account with Malacca Securities Sdn Bhd. The fourth respondent was merely taking instructions from the first respondent without enquiring into the legality thereof. There was no directors' or shareholders' resolution to approve the above transactions of Cin Holdings.

[51] Wong Soon Fong (SD3), from the firm of accountants SFW & Associates, was appointed by the respondents to rebut the ad hoc report and the special audit report. Even though there was no directors' or shareholders' resolution, SD3 supported the payment of the sum of RM389,364 and the transfer of 46,100 PHB shares to Dato Tio, purportedly to meet Cin Holdings' contribution towards the 'listing expenses' of PHB in 1997. SD3 was not aware of the details of the listing expenses which Cin Holdings was supposed to bear. SD3 had not seen any document to prove that the sum of RM389,364 was used for the 'listing expenses' of PHB which, for some unexplained reason, had to be borne by Cin Holdings. SD3 has no knowledge of the identity of those consultants to whom fees had been paid. The expression 'consultant fees' was not mentioned in any part of his report in encl (89). Instead of producing minutes of directors' meetings or annual

general meetings, SD3 relied on statutory declarations affirmed by about 75% of the shareholders purporting to give retrospective approval for such payments, seven years after the transactions. In the absence of a written resolution, SD3 thought of an 'oral' resolution to approve the transfer of shares to Dato Tio. There was no evidence of Cin Holdings acquisition of 200,000 PHB shares at RM8 per share from Syed Izhar and SD3 had not verified this transaction. There was no evidence to prove that an additional 2,000,000 PHB shares were acquired from Malpac Securities through a third party. A margin loan of RM12m was obtained from Malpac Securities to finance the acquisition of the 2,000,000 PHB shares but Cin Holdings had not passed any resolution to authorise this loan. As alluded to above, the statutory declarations, affirmed seven years after the transactions, run counter to s 156.

[52] The fifth respondent, Tan Lai Chon (SD4), disputed the ad hoc report, and preferred to rely on 'oral' approvals for the transactions relating to PHB shares handled by the first respondent for Cin Holdings. SD4 could not remember the details thereof. He did not know the recipient of the 'listing expenses' allegedly paid by Cin Holdings through Dato Tio. He also did not know of any record showing that Cin Holdings had bought 200,000 PHB shares from Syed Izhar. Although he agreed to Cin Holdings' payment of 'listing expenses', he did not know Cin Holdings' contributions, as 'certain doings cannot be in black and white' and 'not every transaction can be recorded'. SD4's testimony shows that the first respondent's transactions and dealings carried out for Cin Holdings were unrecorded and unsupported by any directors' or shareholders' resolution, and that the first respondent had acted as though these transactions and dealings were his own.

[53] The evidence adduced respectively for the petitioners and the respondents apparently show two conflicting versions. Given this situation, it is my duty to accept one version and reject the other. I follow the safer approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case, and that plausibility should never be mistaken for veracity. This approach was also applied by James Foong J (now FCJ) in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 at p 349E–H and by me in *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor*.

[54] I therefore accept the petitioners' version as the reasonable, credible and probable version, on the ground that it is cogently supported by

documentary evidence. The evidence adduced for the respondents is self-destructive and clearly contradicts their own contemporaneous documents.

[55] In *Eric Lau Man Hing v Eramera Jaya Sdn Bhd & Ors* [1998] 7 MLJ 528, the court found for the petitioners in a s 181 petition as there were irregular financial transactions by the respondents who are majority shareholders. The factual matrix there is similar to the situation before me (see also *Re Coliseum Stand Car Service Ltd Abdul Khalik v Mohamed Jee & Ors* [1972] 1 MLJ 109; *The Companies Act — An Annontation* by Walter Woon & Andrew Hicks at p 89; and *Tan Kian Hua v Colour Image Scan Sdn Bhd & Ors* [2004] MLJU 178; [2004] 6 CLJ 174 p 188–189).

REMOVAL OF DIRECTORS

[56] The respondents initially attempted to remove the first, fourth and sixth petitioners as directors of Cin Holdings and to appoint the fourth, fifth and ninth respondents as replacements via an extraordinary meeting (EGM) which was to be held on 28 May 2003. The first, fourth and sixth petitioners had foiled that attempt and, pursuant to s 128, prepared a representation which was circulated to all the members. On 28 May 2003, before the EGM could be held, the fourth, fifth and tenth respondents withdrew their requisition for the EGM.

[57] The respondents' second attempt was to remove the first, third and fourth petitioners as Cin Holdings' directors and to appoint the fourth, fifth and sixth respondents in their place via an EGM to be held on 13 August 2003. The first, third and fourth petitioners had also foiled that attempt and, pursuant to s 128, prepared a representation which was circulated to all the members. At the EGM on 13 August 2003, a request was made for a poll to be taken. Due to a dispute on the admission of votes, the first petitioner, in his capacity as Cin Holdings chairman, rejected the votes of the first, second, third, fourth, fifth, ninth and tenth respondents pursuant to Article 61 of Cin Holdings' articles of association. The respondents have given no ground for the removal of the first, third and fourth petitioners as directors nor responded to the representations circulated pursuant to s 128. The majority voted against the proposed ordinary resolution to remove the first, third and fourth petitioners as directors.

[58] Notwithstanding the rejection of the resolution to remove the first, third and fourth petitioners as directors at the EGM on 13 August 2003, the first respondent had purportedly signed Form 49 stating, inter alia, that the

first, third and fourth petitioners had been removed and three new directors ie the fourth, fifth and sixth respondents were appointed at the EGM and that one Tee Geok Hoon of Key Consult Sdn Bhd had been appointed as the joint-secretary for Cin Holdings ('the purported secretary'). A

[59] On or about 21 August 2003, the purported secretary lodged Form 49, Form 48A, and other statutory documents with the Companies Commission of Malaysia ('CCM'). B

[60] Cin Holdings had vide solicitors' letter dated 25 August 2003 notified CCM of the illegality and falsification of Form 49. Pursuant to the letter, CCM struck out the fourth, fifth and sixth respondents from the list of directors and the purported secretary and reinstated the first, third and fourth petitioners as directors. C

[61] The purported secretary had vide notice dated 22 August 2003 notified that a directors' meeting was to be held on 30 August 2003. One agenda was to instruct Cin Holdings' solicitors to discontinue the civil suit against the first respondent and Messrs OL Yeo & Co, Cin Holdings' statutory auditor. Cin Holdings and the petitioners had notified the purported secretary and the first respondent of the illegality, warning that further legal proceedings would ensue if the said parties persisted with their wrongful actions. Further, the petitioners solicitors had on 18 December 2003 received a letter from CCM confirming the list of Cin Holdings' directors. The fourth, fifth and sixth respondents were not included as such directors. D E F

[62] In my judgment, the respondents' ulterior motive or mala fides to remove the petitioners as directors was clearly to stifle or discontinue the civil suit. The first, third. fourth and sixth petitioners have sufficient proprietary interest to remain as Cin Holdings's directors (see *The Companies Act of Malaysia — An Annotation* by Walter Woon & Andrew Hicks at p 85; and *Hayes v Bristol Plant Hire Ltd & Ors* [1957] 1 All ER 685), where it was held, inter alia, that a director has sufficient proprietary interest to pursue an action for declaration and injunction to restrain removal from the board. G H

[63] The first respondent's attempt to stifle the civil suit by Cin Holdings against him and his irregular transactions have caused the depletion in Cin Holdings' assets, especially its cash reserves, to the benefit of the respondents but to the detriment of the petitioners who are the minority shareholders. I

[64] The petitioners have established all the three essential elements under s 181(1)(a), for which the remedies are available under s 181(2).

ORDERS

[65] The facts clearly demonstrate the predominant role played by the first respondent in the irregular transactions and episodes unfolded above, while the other respondents were trivial and subservient players who have indeed danced to the tune and music of the first respondent. In the circumstances, I make the following orders:

(1) Against all respondents, prayers (1)(a), (b) and (c); (2)(a) and (b); and (3).

(2) Against the first respondent, prayers (4), (5), (6) in favour of the ninth petitioner ie Cin Holdings only; and (7) ie costs to be borne and paid by the first respondent to all the petitioners.

[66] The above judgment was delivered on 12 February 2009.

ASSESSMENT OF DAMAGES

[67] On 26 March 2009, assessment of damages, pursuant to prayer (5) above, was proceeded with. Evidence was adduced for Cin Holdings through SP2.

[68] The measure of damages suffered by Cin Holdings is based on the valuation of Cin Holdings' investments in quoted shares at market value as at 30 September 2002 ie RM3,029,851 and 20 March 2009 ie RM209,518.03. The diminution in value is therefore RM3,029,851 – RM209,518.03 = RM2,820,332.97. This valuation of Cin Holdings investments in quoted shares was arrived at by reference to the public record of share prices at Bursa Malaysia.

[69] There was no evidence in rebuttal. The first respondent did not testify at all. He also did not call any other witness in the same proceedings.

[70] In the circumstances, I am unable to sustain the submission presented for the first respondent that Cin Holdings had not suffered any actual loss occasioned by the loss of opportunity; and that the diminution in value of RM2,820,332.97 is too remote.

[71] I hold that Cin Holdings had discharged the onus of proving that it has sustained the said damage, on a balance of probabilities. I therefore award a sum of RM2,820,332.97 by way of damages, with interest at 8%pa from 19 October 2002 to the date of realisation, and costs to be paid by the first respondent to Cin Holdings.

Application allowed with costs.

Reported by Kanesh Sundrum